IN THE SUPREME COURT OF UTAH

DAVENCOURT AT PILGRIMS LANDING TOWNHOME OWNERS ASSOCIATION, a Utah non-profit corporation, Plaintiff/Appellant, v. DAVENCOURT AT PILGRIMS LANDING, LC, a Utah limited liability company, LeGRAND WOOLSTENHULME, an individual, MICHAEL D. PARRY CONSTRUCTION COMPANY, INC., a Utah corporation, and JOHN DOES 1-30 TOWNHOME OWNERS ASSOCIATION, a Utah non-profit corporation, Defendants/Appellees. THE COMMUNITY ASSOCIATIONS INSTITUTE and UTAH CHAPTER OF THE COMMUNITY ASSOCIATIONS INSTITUTE, Amicus Curiae.	Appeal No. 20070914

AMICUS CURIAE BRIEF IN SUPPORT OF DAVENCOURT AT PILGRIMS LANDING TOWNHOME OWNERS ASSOCIATION

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INTEREST OF AMICUS CURIAE

The Community Associations Institute ("CAI") is a national organization dedicated to fostering vibrant, competent, harmonious community associations. For more than 30 years, CAI has provided education and resources to the volunteer homeowners who govern community associations and the professionals who support them. CAI advocates on behalf of community associations' interests before legislatures, regulatory bodies, and courts, both nationwide and in Utah. As an advocate, CAI's mission is to protect the vitality, functionality, and harmony of community associations. CAI has more than 50 state, regional, and local chapters.

The Utah Chapter of CAI ("UCCAI") is the local chapter of CAI, encompassing the State of Utah. UCCAI has advocated on behalf of its members and community associations' interest before the Utah legislature. UCCAI's members include community association volunteer leaders, professional managers, community management firms, and other professionals and companies that provide products and services to community associations and the residential developments they govern.

STATEMENT OF FACTS

CAI and UCCAI adopt the Appellant's Statement of Facts concerning this proceeding.

SUMMARY OF ARGUMENT

This court's opinion in the case of American Towers Owners Assn. Inc. v. CCI Mechanical Inc., 930 P.2d 1182 (Utah 1996), which has already been limited by several subsequent precedents, and which this Court "do[es] not find [to be] persuasive authority

regarding the current state of the economic loss rule in Wyoming or Utah,"[1] should be expressly reversed. The opinion wrongfully denies Utah home purchasers, particularly those purchasing in community associations, appropriate legal recourse. This is particularly true with regard to the doctrine's application to community associations and those who own units or lots within them.

American Towers, as read by the court below, and as it is being read by other Utah trial courts, is clearly in conflict with prior and recent opinions of this Court and the Utah Court of Appeals. Absent the reversal, limitation or clarification of the American Towers opinion, confusion will continue to reign at the trial court level, and a wide variety of tortious wrongs, being regularly suffered by hundreds if not thousands of Utah residents, will be insulated from remedy or recourse. Because American Towers was based upon faulty premises, most of which have been recognized as such by subsequent opinions, it should be reversed.

Cases subsequent to American Towers have clarified the more appropriate scope of the "economic loss rule," and more appropriately reference it as the "independent duty rule," and should establish the appropriate boundary between contractual and tort remedies.

If this Court does not expressly overrule American Towers, it can and should limit its precedent only to those circumstances where there is no historical or independent duty

[1] Grynberg v. Questar Pipeline Co., 2003 UT 8, ¶49, 70 P.3d 1.

to prevent economic or pecuniary loss; alternatively, the holding of American Towers should be limited so that it does not preclude the pursuit of negligence claims where there is no applicable contract between the parties, where the contracts are between parties with unequal bargaining power or where the parties' contracts are silent respecting the duties of care that are owed between the parties.

In addition, the Court should clarify that the duties owed by developers and contractors as recently established and clarified by this Court's decisions in Smith v. Frandsen, 2004 UT 55, 94 P.3d 1919 and Yazd v. Woodward Homes, 2006 UT 47, 143 P.3d 282 and in the Court of Appeal's decision in Moore v. Smith, 2007 UT App 101, 158 P.3d 562 create implied warranties to construction consumers, which can be enforced through breach of contract actions.

ARGUMENT

POINT I

AMERICAN TOWERS, WHICH HAS ALREADY BEEN LIMITED AND QUESTIONED BY THIS COURT, SHOULD BE REVERSED OR FURTHER LIMITED

The applicability of American Towers to various non-intentional torts can and should be limited. There are numerous relationships among building professionals and consumers that have long been recognized by Utah courts as creating duties; the breach of these duties has historically given rise to causes of action for negligence, and the Court

should reaffirm that damages can and should be recoverable, in appropriate cases, for negligent misconduct in the building setting.

In the case of Hermansen v. Tasulis, 2002 UT 52, 48 P.3d 237, the Utah Supreme Court clarified the scope of Utah's economic loss rule, expressly holding that the economic loss rule does not bar claims for "breaches of duties arising outside of written contracts." The economic loss rule, the court said, does not bar claims where independent duties, arising from outside of the contract, are breached.

A. Building Professionals Owe "Independent Duties" to their Customers.

In the state of Utah, licensed general contractors, and licensed architects, engineers and other professionals in the building trades, owe statutorily and judicially established duties of care to their customers and the public at large. These duties include duties to insure the suitability of the homes that they build, and to disclose information which is relevant to the Units' suitability as residences.

Hermansen v. Tasulis clearly established that parties should be allowed to pursue negligence claims against those who have duties which arise independently of a contract, and the economic loss rule should not, in any way, limit or restrict homeowners' (or other construction consumers') right to bring claims arising from building professionals' breaches of duty.

Utah building professionals have a legal obligation to comply with the building, safety, and fire codes of the State of Utah, and its municipalities. These statutory duties,

codified in Utah Code Ann. Chapters 58-3a (Architects' Licensing Act), 58-22 (Professional Engineers and Professional Land Surveyors Licensing Act), 58-55 (Utah Construction Trades Licensing Act), and 58-56 (Utah Uniform Building Standards Act) arise independently of the contracts between professionals and their customers. In light of these independent duties and in light of the precedent established by Hermansen v. Tasulis, customers should be allowed to pursue building professionals for their violations of these clearly established duties.

The Utah Supreme Court has recently acknowledged, "… the law imputes to builders and contractors a high degree of specialized knowledge and expertise with regard to residential construction." Smith v. Frandsen, 2004 UT 55, ¶ 18, 94 P.3d 1919. See also, Moxley v. Laramie Builders, Inc., 600 P.2d 733, 735 (Wyo. 1979)("consumer protection demands that those who buy homes are entitled to rely on the skill of the builder" that the home is fit for habitability). More recently, in the case of Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283, this Court reaffirmed, expressly, that a duty is owed to buyers of homes by builder-contractors. This Court expressly recognized the duty of a builder-contractor in the context of a direct action for recovery brought by a home buyer. ("Although we did not recognize the duty of the builder-contractor in the context of a direct action for recovery brought by a home buyer in Smith, we today extend its application to that setting.") (Id. at ¶25.) The combined effect of Hermansen v. Tasulis, Smith v. Frandsen, Yazd v. Woodside Homes and Moore v.

Smith is to eliminate the economic loss rule as a defense, at least insofar as it has arguably provided protection to those builders who breach their independently owed duties of care.

B. American Towers has been Appropriately Questioned, and Should be Reversed.

The case of American Towers Owners Ass'n, Inc. v. CCI Mechanical, Inc., 930 P.2d 1182 (Utah 1996), appears to be the only case in which the Utah Supreme Court has affirmatively limited the recovery of economic losses for negligence associated with the construction of a home. To the extent that the case limits the recovery of economic losses for a purchased product (or residence), it appears to be consistent with the majority rule regarding the prohibition of recovery of economic losses in situations that are governed by the Uniform Commercial Code and/or by contract.[2] However, to the extent

[2] The economic loss doctrine originated in areas between sophisticated commercial parties, and that is the area where it continues to have continued support. In cases between parties of different bargaining powers, or cases between professionals and customers, the clear trend among states in the Intermountain West is towards limitation of the doctrine through the "independent duty" analysis. See, e.g., SMI Owen Steel Co. v. Marsh USA, Inc., 520 F.3d 432, 2008 U.S. App. LEXIS 5024 (5th Cir. 2008) (asserting, in diversity case, Nevada's adoption of "independent duty" analysis); D&D Transport Ltd v. Interline Energy Savings, Inc., 117 P.3d 423 (Wyo. 2005) (Wyoming has adopted economic loss doctrine in product liability cases, but will look to existence of independent duties in negligence settings). Farmers Alliance Mut. Ins. Co. v. Naylor, 480 F.Supp.2d 1287 (D.N.M. 2007) (Reaffirming New Mexico's independent duty analysis, citing Adobe Masters v. Donlevy, 883 P.2d 133 (NM 1994) ("When professional services arising from contract are substandard, a plaintiff may bring a cause of action for malpractice based on negligence or for breach of contract arising from the breach of the implied warranty to use reasonable skill."). See also the Colorado history

that the American Towers opinion contains language that impliedly precludes the recovery of all economic losses from non-intentional torts, it runs afoul of prior Utah precedent and should be limited.

A number of courts, in recent years, have realized the inherent problems with precluding recovery of economic losses in all non-intentional torts. Courts are recognizing that in numerous situations (discussed *infra*), a broad application of the economic loss rule guts traditional bases of liability and results in substantial inequities. Before this Court continues the doctrine of American Towers, it should carefully analyze those situations in which economic recovery for non-intentional torts remains appropriate, notwithstanding the existence of a contract, and particularly in these cases where there is no contract.

Maack v. Resource Design & Constr., Inc., 875 P.2d 570 (Utah App. 1994), and Schafir v. Harrigan, 879 P.2d 1384 (Utah App. 1994), the cases which preceded and principally supported American Towers, both involved the purchase of used homes, from sellers other than the original contractor. They are thus distinguished from those cases which involve the purchase of lots, contracts for the construction of new homes and even the purchase of constructed, but new homes. An economic loss rule that applies only to the purchase of manufactured products and used homes can be reconciled with

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set forth in Point I, AMERICAN TOWERS, WHICH HAS ALREADY BEEN LIMITED AND QUESTIONED BY THIS COURT, SHOULD BE REVERSED OR FURTHER LIMITED, infra.

previous opinions of the Utah Supreme Court and the Utah Court of Appeals. This is because in the purchase of manufactured products and used homes, the purchaser is not paying for services.

Conversely, where a homebuyer contracts with a contractor to purchase a new home, or specifically retains building professionals to design and/or construct a new home, the buyer is paying for the services associated with the construction of that home. There, regardless of what the contract may provide, a duty arises outside of, and independent from, the contract.

A doctrine that holds that all economic losses resulting from negligence are barred, regardless of the relationship between the parties, runs afoul of this Court's previous precedent and, indeed, ignores the precedents relied upon in American Towers.[3] The treatise relied upon in American Towers, W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 92 (5th ed. 1984), arguably supports the American Towers opinion only to the extent that opinion applied to completed construction projects; Section 92, also supports the imposition of tort liability that arises outside of the contract in some relationships between contracting parties.[4] Indeed, the same section

[3] An inflexible application of the economic loss doctrine was established by American Towers in direct conflict with Yazd's proclamation that "Any analysis of a tort claim…begins with an inquiry into the existence and scope of the duty owed the Plaintiff by the Defendant." 2006 UT ¶ 11.

[4] §92 of PROSSER AND KEETON provides in relevant part: "Relationships created through bargaining transactions are of many kinds and varieties, such as landlord and tenant, tenants in common of real property, bailor and bailee, owner of land and

cited by the Utah Supreme Court in American Towers was cited in the case of Interwest Constr. v. Palmer, 923 P.2d 1350, 1355 (Utah 1996), as establishing that some contractual relationships create "tort-type duties to the other beyond the duties spelled out in the contract."[5]

Language in American Towers suggests that its holding was intended only to apply to completed homes, as opposed to construction contracts. The Court held, for example, that "a buyer can avoid economic loss resulting from defective construction by obtaining a thorough inspection of the property prior to purchase and then by either obtaining insurance or by negotiating a warranty or a reduction in price to reflect the risk of any hidden defects." American Towers, 930 P.2d at 1190. Obviously this inspection option would not be available to a situation where a purchaser hired a contractor to build a home; in that case the parties could negotiate as to the scope of duties between the parties or duties may arise in connection with the contract.[6] This suggestion of protection through an inspection also ignores that in many situations, the contract to purchase a

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independent contractor. The obligations as between parties to such contracts are not always obligations based entirely on the manifested intent of the parties."

[5] In the Interwest Construction case, the Utah Supreme Court granted certiorari; the Supreme Court reversed the Court of Appeals and specifically established that its decision in the case of Beck v. Farmers Ins. Exch., 701 P.2d 795 (Utah 1995), did not preclude all negligence claims, even where a parallel contract existed.

[6] This of course does not deal with the issue as to what is to be done when the contract is silent as to the parties' duties, or as to the situation when one party with unequal bargaining power unfairly extinguishes duties that should be owed to the purchaser. *Cf.* DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983) (clauses attempting to limit a party's duty in tort are disfavored).

condominium or home will be entered into long before the residence is completed, and in some cases, just as, or before construction actually begins.[7] Lastly, this assumption ignores the reality, recently recognized by this Court in the case of Yazd v. Woodside Homes Corp., that "[T]he disparity in skill and knowledge between home buyers and builder-contractors leads buyers to rely upon the builder-contractor's expertise." 2006 UT 47 at ¶24.

Finally, in American Towers, the Court distinguished an earlier case, W.R.H., Inc. v. Economy Builders Supply, 633 P.2d 42 (Utah 1981), as that earlier case had addressed the negligent manufacture of a product that was utilized in the home's construction. While the distinction drawn is unclear, one possible interpretation would be that the contract to manufacture siding imposed additional obligations by law that could be enforced, whereas the mere purchase of a completed house does not carry such obligations.

The American Towers opinion further based its limitation upon recovery of economic losses based upon its finding that the duties between contracting parties are often set forth in the parties' contract. As is set forth in Point 2, infra, the parties could be allowed, when and where appropriate, to negotiate additional duties, or even limit their

[7] See, e.g., Lesley Mitchell, SLC Condo Market Feels the Crunch, But Prices Hold Steady, Salt Lake Tribune, May 9, 2005. ("A year ago, buyers signed contracts to buy more than half of the available units at The Metro condominiums in downtown Salt Lake City in just the first two weeks they were on the market. Not bad for a development that had just broken ground.")

duties. In the absence of contractual relationships, however, and where the contracts are silent, the economic loss rule should not shield building professionals from their statutory and common law duties of care. Utah courts have repeatedly and recently recognized that independent duties may arise outside of the parties' contracts.

In 1983, the Utah Supreme Court unequivocally and clearly established that "contractual relationships for the performance of services impose on each of the contracting parties a general duty of due care toward the other, apart from the specific obligations expressed in the contract itself." DCR Inc. v. Peak Alarm Co., 663 P.2d 433, 435 (Utah 1983). The Court continued, "A party who breaches his duty of due care toward another may be found liable to the other in tort, even where the relationship giving rise to such a duty originates in a contract between the parties." Id.[8] The Court's opinion referred to the RESTATEMENT (SECOND) OF TORTS § 323 (1977), which provides generally that those undertaking to provide services to another are liable for physical harm resulting from the failure to exercise reasonable care.[9] [10] Likewise, in Interwest Constr. v. Palmer, 923 P.2d

[8] The Court, in its opinion, cited to PROSSER, HANDBOOK ON THE LAW OF TORTS (4th ed. 1971). A subsequent volume of this same treatise was also referenced in the Interwest Construction and American Towers decisions.

[9] RESTATEMENT (SECOND) OF TORTS § 323 (1977) provides:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

1350 (Utah 1996), the Utah Supreme Court reversed the Utah Court of Appeals and stated, "We agree that a buyer of products or services may, in some circumstances, assert tort claims along with breach of contract claims against a supplier." Id. at 1355.[11]

The relationship between building professionals and the buyers and sellers of homes, as established by Utah case law and Utah statutes, acknowledges independent duties arising outside of the contract that can and should be enforced, when appropriate, by causes of action for negligence, prima facie negligence, breach of fiduciary duty, improper consumer sales practices and negligent misrepresentation. Fortunately, the majority of construction defects are not serious enough to result in physical injuries, but the damages sustained by building professionals' negligence can be financially catastrophic, and building professionals can and should be held accountable for failing to live up to the standards of care that they assume as licensed professionals.[12] Community association developers have duties, among other things, "to disclose all material facts and circumstances affecting the condition of the property that the association is responsible for maintaining…" (RESTATEMENT OF PROPERTY (Servitudes) §6.20(6)(1998))

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[10] In American Towers, the court distinguished this section, relying upon the "physical harm" aspect of the language. No such distinction was drawn when the court relied upon this provision in DCR Inc. v. Peak Alarm Co., 663 P.2d 433 (Utah 1983).

[11] While the Interwest opinion ultimately affirmed the lower court's finding of the absence of a breach of contract, it also held that "[the] contract did not preclude [the plaintiff's] claims for negligence." 923 P.2d at 1360.

[12] See, e.g., Utah Code Ann. Chapter 58-3a, Architects Licensing Act, Utah Code Ann. Chapter 58-22, Professional Engineers and Professional Land Surveyors Act and Utah Code Ann. Chapter 58-55, Utah Construction Trades Licensing Act.

The absence of specific contractual provisions setting forth duties should not absolve building professionals from the liability that arises from their breaches of duties.

The continued applicability of the economic loss rule, as set forth in American Towers, creates an anomalous discrepancy as to the potential tort liability of building professionals, as compared to other licensed professionals. The legal profession, the medical profession, and the accounting profession are all professions that have well-developed standards of care towards their clients; in the case of legal and accounting malpractice, virtually all imaginable negligence towards clients results in only economic losses. If the only source of recovery for economic loss is the contractual, then lawyers and accountants could absolve themselves from liability by simply establishing provisions in their retainer letters that limit the duties that they owe to their clients.[13]

Likewise, many cases of professional negligence against doctors result in claims for economic loss (arising from increased medical expenses or wrongful death claims). Building professionals cannot and should not be unique among licensed and regulated professionals in being immune from liability based upon a strict application of the economic loss rule.

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[13] At least in the case of lawyers, such a provision would have obvious ethical limitations. See Utah R. Prof. Con. 1.8(h). That limitation, however, may or may not affect its legal enforceability.

C. Other States are Reducing the Scope of the Doctrine.

Courts from other jurisdictions in the United States that have historically adopted and expanded the economic loss rule are now realizing the problems that arise from too broad of an application of the rule; a trend seems to be developing to cut back the doctrine.

Most notably, the states of Florida and Colorado have recently issued opinions that question the scope of the doctrine in those cases.

In Florida, the State Supreme Court has issued two opinions that acknowledge that the Florida courts' "pronouncements on the economic loss rule have not always been clear and have been the subject of 'criticism and commentary.'" Comptech Int'l, Inc. v. Milam Commerce Park, Ltd., 753 So. 2d 1219 (Fla. 1999); see also Moransais v. Heathman, 744 So. 2d 973 (Fla. 1999). In Comptech, the Florida Supreme Court acknowledged that "we may have been unnecessarily over-expansive in our reliance on the economic loss rule as opposed to fundamental contractual principles." 753 So. 2d at 1225.

D. Colorado's "Independent Duty" Analysis has been Elaborated Upon.

In the Hermansen case, this Court expressly adopted the Colorado Supreme Court's adoption of the economic loss rule as set forth in the opinions of Grynberg v. Agri Tech, Inc., 10 P.3d 1267 (2000 Colo.) and Town of Alma, Colorado v. Azco Constr., Inc., 10 P.3d 1256 (2000 Colo.). Since this Court's opinion in Hermansen, the

Colorado Supreme Court and Colorado Appellate Courts have issued several other opinions following Grynberg and Town of Alma; the precedents from those courts continue to be well reasoned and provide good precedent for this Court's reconsideration of American Towers.

In the case of Yacht Club II Homeowners Assn. Inc. v. AC Excavating, 94 P.3d 1177 (Colo. App 2003), a Division of the Colorado Court of Appeals reversed a trial court's dismissal of negligence claim against subcontractors; the court noted that the subcontractors had an independent duty to act without negligence in the construction of homes, which had been established by the earlier case of Cosmopolitan Homes Inc. v. Weller, 663 P.2d 1041 (Colo. 1983).[14] In 2005, the Colorado Supreme Court in the case of AC Excavating v. Yacht Club Homeowners Assn. Inc., 114 P.3d 862 (Colo. 2005) affirmed the Court of Appeals' opinion. The court stated, "Though the subcontractors assumed contractual obligations with the developer and general contractor, these obligations did not and could not relieve the subcontractors of their independent duty to act without negligence in constructing the development." In 2006, the court reaffirmed that the economic loss rule did not protect general contractors from negligence claims. Park Rise Homeowners Assn. Inc. v. Resource Construction Co., 155 P.3d 427 (Colo. App. 2006). A separate branch of the Colorado Court of Appeals reaffirmed the same

[14] Cosmopolitan Homes was cited and followed by this Court in the case of Smith v. Frandsen, 94 P.3d 919 (Utah 2004).

finding in the case of Andrews v. Picard, 2007 Colo. App. LEXIS 1203 ("A homebuilder has an independent duty to act without negligence in the construction of the home…therefore the economic loss rule does not preclude a homeowner from suing a general contractor or subcontractor for the negligent construction of a home.") These Colorado cases provide well-reasoned precedents by which they each can clarify the appropriate scope of the "independent duty" rule.

POINT II

IN THE ABSENCE OF A CONTRACT, AND IN THE ABSENCE OF A CLEAR CONTRACTUAL LIMITATION AS TO DUTIES OWED, BUILDING PROFESSIONALS SHOULD BE LIABLE FOR NEGLIGENCE

As is set forth in the Appellant's Brief, the nature of community associations often results in situations where there is no privity of contract between the purchasers of the individual condominium units and the developer and/or contractors. (Appellant's Opening Brief at 12-16 and Addendum 3.) That is because in the traditional community association setting, a developer hires a contractor to construct all of the condominium units; thereafter the developer (or in some cases a separate entity created by the developer) will actually sell the units. Thus there is no privy of contract between the condominium unit purchasers and the contractors who actively perform the construction. In many cases, there will not even be a contract between the purchaser and the developing entity. Also in all of these cases, there will not be privity of contract between the unit owner and the sub-contractors.

If the economic loss doctrine is allowed to stand, and if privity of contract is a prerequisite to any recovery, a vast portion of Utah's home buyers who are purchasing in community associations will be without a remedy for construction defects, regardless of how severe they may be.

Furthermore, in a number of other situations, home purchasers will purchase their home subject to a contract which is prepared by the builder. In the vast majority of situations the transaction between a commercial developer of real property and/or a contractor, and a residential purchaser will result in disparate bargaining powers. Home buyers will purchase their home relying upon the expertise and reputation of the builder,[15] and there is little, if any, actual negotiation in these circumstances.

A major premise in the holding in American Towers was the flawed assumption that home purchasers do in fact have equal bargaining powers and an equal opportunity to inspect their premises. This is seldom the case, particularly in a condominium situation, simply because most condominiums contain significant common areas, which are owned in common by the unit owners, as to which an inspection is impractical or impossible. Common walls, common utilities and common roofs, will be owned by all unit owners, and all unit owners will be responsible for their maintenance and repair, but no unit owner will have a specific contract with the contractor respecting the construction of

[15] *Cf* Yazd v. Woodside Homes Corp., 2006 UT 47, 143 P.3d 283 at ¶24 (We have found that the disparity of skill and knowledge between home buyers and builder-contractors leads buyers to rely on the builder-contractor's expertise.")

these common areas.[16] Furthermore, each unit owner will be purchasing their unit on their own form contract, and those few contract purchasers who take the time to negotiate specific protections as to the quality of construction and the nature of workmanship may be jeopardized if other unit owners fail to do so.

In this multitude of situations where there is no privity of contract between the purchasers of homes and the responsible building professionals, negligence standards should apply.[17]

Likewise, in those situations where the parties bargain, contractors could limit their exposure by contract, provided that the contracts do not run afoul of the restrictions set forth in the case law. In the recent case of Pearce v. Utah Athletic Foundation, 2008

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[16] A condominium owner purchases his or her unit and an undivided percentage interest in the common areas. Utah Code Ann. 57-8-7(2). Even if a unit owner obtains an inspection of his or her home, they are unlikely to have the foresight to have the association's infrastructure, including roadways, inspected. Defects in these common areas, however, will need to be paid for by the unit owners, in the amount of the proportionate ownership interest. Utah Code Ann. 57-8-20(1).

[17] Building industry representatives will complain (as they did in American Towers) that the availability of a negligence remedy may result in limitless liability. This baseless allegation ignores the fact that negligence requires at the outset the establishment of a duty which is owed and a breach of that duty; this Court can take judicial notice that the Utah judicial system is not one in which warrantless litigation is common. Indeed, Utah ranks, according to the Institute for Legal Reform, as being fifth among the fifty states in the fairness of its litigation environment.
(http://www.instituteforlegalreform.com/states/lawsuitclimate 2008/.)

Furthermore, it would be better public policy to allow contractors and developers to contract their legal duties away, than to continue Utah legal precedent which takes these duties away from home purchasers who may not otherwise know what they should be contracting for.

UT 13, 179 P.3d 760, the Utah Supreme Court reaffirmed that "people may contract away their rights to recover in tort for damages caused by the ordinary negligence of others." Id. at ¶14, citing Rothstein v. Snowbird Corp., 2007 UT 96, ¶6, 175 P.3d 560; Berry v. Greater Park City Co., 2007 UT 87, ¶15, 171 P.3d 442.

Thus, if and when this Court reverses or limits American Towers, building professionals and purchasers will be free to knowingly negotiate for lower standards of care than may otherwise be applicable, but the homeowners of the state of Utah will at least be aware when that occurs. Furthermore, Utah homeowners would then be protected by the limitations upon pre-injury releases; this Court will not enforce those releases in circumstances where the (1) the releases offend public policy; (2) the releases are for activities that fit within the public interest exception; and (3) the releases are unclear and ambiguous. Pearce at ¶14.

Under the current precedent of American Towers, Utah homeowners are not entitled to any protection against negligent conduct from builders unless they have the knowledge and foresight to specifically contract for that protection. This is bad public policy which should be reversed; Utah homeowners should be able to rely upon the duties of care which are owed by contractors unless and until those obligations are clearly and conspicuously contracted away.

POINT III

THIS COURT SHOULD ESTABLISH IMPLIED WARRANTIES TO PROVIDE PROTECTION TO THE BUYERS OF NEW RESIDENCES

Utah Courts have never affirmatively adopted any implied warranties with respect to the sale of housing, whether new or used.[18] This Court's precedent and sound public policy, warrant that this Court do so in this case.

In the recent case of Smith v. Frandsen, 2004 UT 55, 94 P.3d 1919, however, the Court noted the trend "beginning in the late 1960s and extending through the late 1980s whereby builder-vendors were held liable under an implied warranty of habitability."[19] That opinion, coupled with the other decisions in Smith v. Frandsen, 2004 UT 55, 94 P.3d 1919, Yazd v. Woodside Homes, 2006 Utah 47, 143 P.3d 283, and Moore v. Smith, 2007 UT App 101, 158 P.3d 562, establishes that Utah public policy has evolved to the point that implied warranties, including implied warranties of compliance with building codes, implied warranties of workmanlike construction, and implied warranties of habitability would be appropriately adopted in this state. It is without doubt that all Utah home purchasers, making for many what will be the largest purchase of their life, have an expectation that the homes which they are purchasing will be, at a minimum habitable,

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[18] Utah Courts have, however, long noted with implied approval the existence of such implied warranties in other jurisdictions. See, e.g., Groen v. Tri-O-Inc., 667 P.2d 598 (Utah 1983) ("Many states imply a warranty of habitability in the sale of a new home. Similarly, many courts have found a warranty of workmanlike performance implied in a contract for services.") (667 P.2d at604).

[19] Citing Conklin v. Hurley, 428 So.2d 654, 657, n.2 (Fla 1983).

and in most cases it would be reasonable to assume that they would meet the higher (but certainly not unreasonable) standards of compliance with building codes and/or workmanlike construction. For the protection of Utah consumers (and for the protection of those builders who do competently and appropriately construct the residences which they sell), such a warranty is appropriate and in accord with public policy.

Almost 20 years ago, in the case of Wade v. Job, 818 P.2d 1006 (Utah 1991), this Court abandoned the long-standing common law provision, and held that tenants in the state of Utah had an implied warranty of habitability. Several policy reasons supported that conclusion, noting that, "The concept of a warranty of habitability is in harmony with the widespread enactment of housing and building codes which reflect the legislative desire to ensure decent housing." Obviously these same housing and building codes reflect a legislative desire that purchased housing should also be at least decent; beyond that, however, housing which is built and sold to Utah residents should comply with those housing and building codes. The fact that the legislature feels that the codes are important enough to be adopted strongly suggests that they are important enough to be enforced, even in the absence of an express provision in the parties' contracts.[20]

[20] Furthermore, the legislative history surrounding the recent adoption of 2008's SB220 (code filed at Utah Code Ann. §78B-4-513 (Utah 2008)), reflects that the legislature assumes such implied warranties exist. (During discussion of the proposed legislation, the House amendment sponsor, Kay McIff, (a lawyer) stated in part:

> McIff: Yeah, well if a contract is in writing, then the written terms govern. But many contracts are entered into verbally so the court must inquire, the parties try to establish their contract by testimony. And this is designed to make it clear that whether the

As the court noted in the Wade v. Job case, "In consumer law, implied warranties are designed to protect ordinary consumers who do not have the knowledge, capacity, or opportunity to ensure that goods which they are buying are in safe condition." Similarly, purchasers in condominiums and in other types of community associations are often purchasing in a project which is exclusively controlled, throughout the course of construction, by the developer and a governing board which is appointed by and under the control of the developer.[21] These directors, as agents of the developer, should have an obligation and duty to disclose adverse conditions of which they have become aware during the construction process; but, furthermore, they, in light of their superior knowledge of the quality and course of construction, should be held to be implying a warranty (in the absence of an express disclaimer) that the premises are at a minimum habitable, and preferably, a warranty that they are being constructed in compliance with

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contract is in writing or a verbal contract, the cause of action for breach will lies and that cause could include implied or express warranties. Um, warranties of habitability or warranties that normally apply many times are put into the writing, but whether or not they're in the written agreement, they still apply. I'm not sure that addresses your inquiry. If not, rephrase it and I'll try…
Holdaway: So if somebody were to make the claim, for example, on an implied warranty, they would have to provide some kind of evidence in terms of well my wife and I heard the builder say this was what was going to take place. Would that be an implied warranty?
McIff: No. An implied warranty is one that arises by operation of law. The law implies certain warranties, they're not set forth, a warranty that the home would be habitable. Whether they discuss the requirement that it be habitable or not, the law implies that type of warranty.

[21] See, e.g., Utah Code Ann. 57-8-16.5, which mandates transition of control from the developer to the unit owners.

building codes and in a workmanlike manner.

Obviously the course and scope of the implied warranties which will accompany the sale of new residences will need to be established on a case by case basis, but this case presents facts which warrant and should provide an opportunity for this Court to begin establishing the existence and parameters of those duties. It is clearly in the public interest of the residents of Utah that developers and contractors provide some implied warranties; to the extent that builders wish to deviate from the warranties which will be implied by law, they should have to do so clearly and conspicuously in accord with the disclosure requests established in cases such as DCR v Peak Alarm. See Point II supra.

CONCLUSION

For many years the American Towers opinion has wrongfully denied or limited many Utah homeowners, particularly those in community associations, any means of redress for construction defects which could have and should have been prevented merely by the building professionals' compliance with applicable building codes and standards of the industry. American Towers wrongfully established building professionals as unique among professionals in that they were insulated from accountability for their violations of the duties which they owe to consumers; this is based upon the anomalous fact that their breaches often resulted in economic, as opposed to personal, injuries. The nature of the injury, however, should not be determinative as to whether or not there is a recovery; rather the analysis of tort liability should be on whether there is an independent

duty, and whether or not that duty was breached.

The case of Hermansen v. Tasulis significantly narrowed and clarified the appropriate distinction between contract and tort law; Hermansen v. Tasulis appropriately reaffirmed prior precedent which has held that there are circumstances when duties arise outside of contracts and that these duties should be enforced both in the presence of a contract and, more importantly, in the absence of a contract. This Court should expressly overrule American Towers, and should establish the precedence established in Hermansen v. Tasulis applicable to all circumstances relating to contracts for purchasers of new homes which, by their very nature, entail some degree of a service component.

Furthermore, for the protection of the residents of the State of Utah, this Court can and should confirm the existence of appropriate implied warranties in connection with the construction and sale of new houses, in order to protect Utah consumers who make the single largest investment of their life with the reasonable expectation that their purchase will meet certain reasonable standards. The imposition of limited implied warranties is not converse to the interests of reputable builders. Only the disreputable builders, and the builders who are unwilling and unable to stand behind their products, should be concerned with the adoption of implied warranties which affirm the requirements of habitability, compliance with building code, and/or workmanlike construction.

DATED this 23 day of June, 2008.

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CERTIFICATE OF SERVICE

I hereby certify that on the 23 day of June, 2008, I caused a true and correct copy of the foregoing AMICUS CURIAE BRIEF to be served upon the following in the manner indicated:

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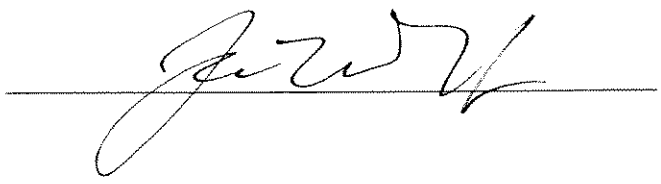

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